United States Courts
Southern District of Texas
ENTERED
MAR 27 2003
Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION,	§ § §	MDL 1446
MARK NEWBY, ET AL., Plaintiffs	§ § § §	
VS.	§ §	CIVIL ACTION NO. H-01-3624 AND CONSOLIDATED CASES
ENRON CORPORATION, ET AL., Defendants	§ § §	
SILVERCREEK MANAGEMENT, INC. ET AL., Plaintiffs,	§ § § §	
VS.	§ §	CIVIL ACTION NO. H-02-3185
SALMON SMITH BARNEY, INC., ET AL., Defendants.	§ § § §	

ORDER

Pending before the Court in H-02-3185 *inter alia* are the following motions:

(1) Plaintiffs Silvercreek Management Inc., Silvercreek Limited Partnership, Silvercreek II Limited, Onex Industrial Partners Limited and Pebble Limited Partnership's motion to strike (instrument #27) the Declaration [Affidavit] of Max Glitter in Support of Goldman, Sachs & Co.'s ("Goldman, Sachs'")

#1305

Motion to Dismiss the Complaint, or Alternatively to Compel Arbitration[1];

(2) Defendants Banc of America Securities LLC, Salmon Smith Barney, Inc., and Goldman, Sachs' Motion to Strike Declaration of Louise Morwick[2], or, in the Alternative, Request that the Court Decline to Consider It in Ruling on the Pending Motions to Dismiss (#37);

(3) Plaintiffs' Motion to Strike (#41) the Declaration [Affidavit] of Richard A. Rosen[3];

(4) Plaintiffs' Motion to Strike (#42) the Declaration [Affidavit] of Gregory A. Markel.[4]

Plaintiffs' motion to strike Max Glitter's declaration asserts that Glitter lacks personal knowledge to authenticate Exhibits A through E to Goldman's motion[5] and that paragraph two

---

[1] Max Glitter is counsel for Goldman, Sachs. His affidavit is attached to Goldman, Sachs' motion to dismiss, instrument #7.

[2] The Declaration of Louise Morwick, President of Plaintiff Silvercreek Management, Inc., is filed as instrument #29.

[3] The affidavit of Richard A. Rosen, attorney for Salomon Smith Barney, Inc., is filed to authenticate exhibits attached to it as instrument #12, in support of Salmon Smith Barney's Motion to Dismiss Complaint (#10).

[4] The affidavit of Gregory Markel, attorney for Banc of America Securities LLC, is attached to and seeks to authenticate exhibits to Banc of America's Motion to Dismiss Complaint, or Alternatively to Compel Arbitration (#14).

[5] Glitter avers that the attached documents are true copies of the originals, which he identifies as various Partnership Account Agreements and Corporate Account Agreements

of the affidavit sets forth statements attributed to Shaheen Rushd that are hearsay and are irrelevant. No opposition has been filed to the motion to strike Glitter's affidavit.

Federal Rule of Evidence 901(a) provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The proponent does not have to rule out all possibilities not consistent with authenticity; the standard is one of "reasonable likelihood." *United States v. Alicea-Cardoza*, 132 F.3d 1, 4, 5 (1st Cir. 1994). To authenticate documents used to support a motion, a party must attach the documents as exhibits to an affidavit made by a person through whom the exhibits could be admitted into evidence at trial. *Orr v. Bank of America NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002).[6] To authenticate by affidavit, an affiant must affirmatively show that he has personal

---

between Goldman, Sachs and the various Plaintiffs or their predecessors in interest, and a Master Letter Non-U.S. Investment Advisor from Silvercreek Management Inc. to Goldman, Sachs dated March 12, 2001.

[6] In addition to authentication by a proper affidavit, Rule 901(b) provides illustrations of ten other ways in which evidence may be authenticated (testimony of a witness with knowledge, nonexpert opinion on handwriting based upon familiarity, comparison with authenticated examples, distinctive characteristics, voice identification, telephone conversations authenticated by evidence that a call was made to a particular number assigned to a particular person or business, public records or reports, ancient documents or data compilations shown to be in a place where an authentic document would be or shown to be in existence for at least twenty years, and methods provided by statute or rule), and Rule 902 identifies types of self-authenticating documents that do not need an extrinsic foundation.

knowledge and "is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). The Seventh Circuit has observed,

> The proper ground for excluding affidavits is that witnesses who are not expert witnesses--and these affiants were not--are permitted to testify only from their personal knowledge. Testimony about matters outside their personal knowledge is not admissible, and if not admissible at trial neither is it admissible in an affidavit used to support or resist the grant of summary judgment. . . . It is true that "personal knowledge" includes inferences--all knowledge is inferential--and therefore opinions. But the inferences and opinions must be grounded in observation or other first-hand personal experience. They must not be flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience. [citations omitted]

Visser v. Packer Engineering Associates, Inc., 924 F.2d 655, 659 (7th Cir. 1991). Hearsay evidence is not admissible unless it satisfies the requirements for a recognized exception to the hearsay rule under Fed. R. of Evid. 803. *Oriental Health Spa v. City of Fort Wayne*, 864 F.2d 486, 490-91 (7th Cir. 1988). An attorney's affidavit must meet the same standards as any other person's affidavit. *Postscript Enterprises v. City of Bridgeton*, 905 F.2d 223, 225 (8th Cir. 1990)(attorney affidavits must be based on personal knowledge); *Northwestern Nat'l Ins. Co. v. Baltes*, 15 F.3d 660, 662 (7th Cir. 1994)((affidavit filed by attorney without personal knowledge found to be inadmissible); *Sellers v. MC Floor Crafters, Inc.*, 842 F.2d 639, 643 (2d Cir. 1988). Generally "[a] document can be authenticated under Rule 901(b) by a witness who wrote it, signed it, used it, or saw others do so." *Orr*, 285 F.3d

at 774 n.8, *quoting* 31 Wright & Gold, *Federal Practice & Procedure: Evidence* § 7106,43 (2000). When authenticity is challenged, the judge then makes a preliminary determination whether the evidence is sufficient "to allow a reasonable person to believe the evidence is what it purports to be," but the final determination as to what weight it will be given or whether it is disregarded is within the province of the jury or factfinder. *Alicea-Cardoza*, 132 F.3d at 4; 5 J.B. Weinstein's *Federal Practice Evidence* § 901.02[4] (1999). In determining admissibility, the judge may consider circumstantial evidence, such as where the document is located, or indicia on the document providing evidence of authenticity. *See generally John Beaudette, Inc. v. Sentry Ins. A Mut. Co.* 94 F. Supp.2d 77, 89 (D. Mass. 1999)(and citations therein).

Glitter's affidavit does not affirmatively show personal knowledge of the documents nor present a factual basis to aver that the documents are true and accurate copies of the originals. Moreover, authentication of documents as business-record exceptions to the hearsay rule must be made in accordance with Federal Rule of Evidence 803(6) "by testimony of the custodian [of business records] or other qualified witness or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification . . . ." The witness or affiant need not have personal knowledge of the contents of those records; he does need to know about the business' procedures under which the records were created. *United States v. Wables*, 731 F.2d 440,

449 (7th Cir. 1984)(For admission of documents under the business records exception to the hearsay rule, a witness must "establish[] the regular practices and procedures surrounding the creation of records, the very elements that are necessary for a finding of trustworthiness."). The affidavit fails to demonstrate such knowledge by Glitter, and the records are unaccompanied by a certification from a custodian of records.

Furthermore, the Court agrees with Plaintiffs that the paragraph reciting statements by Shaheen Rushd is hearsay and does not fit an exception to the hearsay rule, so it is inadmissible.

In addition, buried in Defendants' reply memorandum (#40) relating to Morwick's declaration, they claim that Glitter's affidavit, with exhibits, "was submitted in support of Goldman's alternative motion to compel arbitration, not its motion to dismiss." Nevertheless, Glitter's affidavit (#7) states on its face, "I submit this affidavit in support of Goldman's motion (a) under Fed. R. Civ. P. 12(b)(6) and 9(b) to dismiss the claims against it for failure to state a claim upon which relief can be granted and for failure to plead fraud with particularity, or, alternatively, under the Federal Arbitration Act, 9 U.S.C. § 4, to compel arbitration of the common law claims asserted against it."

Thus the Court grants Plaintiffs' motion to strike Glitter's affidavit and the attached exhibits as they relate to Goldman, Sachs' motion to dismiss.

Plaintiffs move to strike the affidavits of Rosen and Markel for lack of personal knowledge, required for authenticating

the attached exhibits (Rosen-exhibits A-Q; Markel-exhibits A-E). They also claim that several of the exhibits for each (Rosen-exhibits B-D, F, H, I, and K-Q; Markel-A-E) may not be considered on a motion pursuant to Fed. R. Civ. P. 12(b)(6) because the exhibits are not stated in the complaint, attached to the complaint as exhibits, or incorporated by reference in the complaint. *Hayden v. County of Nassau*, 180 F.3d 42, 54 (2d Cir. 1999). Moreover, they object that Exhibits F and I attached to Rosen's affidavit lack foundation.

In response, Defendants state that the exhibits attached to Markel's affidavit are as follows: (1) excerpts of Banc of America Client Statements for Plaintiff Silvercreek Management Inc., reflecting trades/transactions relating to Enron during October and November 2001 (exhibits A and B) and January 2002 (exhibit C; (2) a chart summarizing those transactions (exhibit D); (3) Banc of America Equity Research Reports dated October 24, 2002 (exhibit E) and November 20, 2001 (exhibit F); and (4) a chart reflecting the share price of Enron Oil and Gas common stock for the six-month period from October 2001 through March 2002 (exhibit G).

The exhibits attached to Rosen's affidavits are identified by Defendants as follows: (1) Salmon Smith Barney Client Statements for Plaintiff Silvercreek Management Inc. reflecting trades/transactions related to Enron for October, November and December 2001 (exhibits A-C), for Plaintiff Silvercreek GP Limited reflecting similar trades/transactions on

October 30, 2001 (exhibit D), and for Plaintiff Pebble Capital Inc. for such trades/transactions from October 30 through November 2, 2001 (exhibit E); (2) a chart summarizing the transactions (exhibit F); (3) Enron press releases dated October 16, 2001 (exhibit G) and October 22, 2001 (exhibit J); (4) Moody's Investors Service releases dated October 16, 2001 (exhibit H) and October 29, 2001 (exhibit O); (5) charts showing the share price of Enron common stock in October and November 2001 (exhibits I and P); (6) copies of complaints filed in three federal securities class actions related to Enron, pending in this district (exhibits K-M); (7) the October 25, 2001 Fitch credit profile relating to Enron stock and debt (exhibit N); (8) and excerpts from the July 1999 Enron 7% Exchangeable Notes Prospectus (exhibit Q).

Defendants explain that the exhibits to both Markel and Rosen's affidavits were submitted to support Defendants' contention that Plaintiffs could not establish reliance on the Exchangeable Notes Prospectus at issue here and its accompanying financial statements. They insist that the motions to strike are untimely because they were not filed within the time allowed for filing Plaintiffs' opposition to the motions to dismiss, which was actually filed by Plaintiffs on October 15, 2002 Instead of filing the motions to strike, they filed Morwick's declaration. Only after Defendants filed their reply papers in support of their motion to dismiss and their motion to strike the Morwick declaration on April 30, 2002, did Plaintiffs finally, on May 21, 2002, five weeks after Plaintiffs had filed their opposition to

the motions to dismiss, file the motions to strike. Federal Rule of Civil Procedure 12(f) requires that a responsive pleading to a motion must be filed within twenty days of service of that motion on the party. Furthermore, the exhibits to the Markel and Rosen affidavits are either incorporated by reference in the complaint,[7] or submitted because Plaintiffs alleged only part of their transactions in the complaint so that the complaint was incomplete and misleading,[8] or documents on which Plaintiffs expressly relied, as alleged in the complaint,[9] or documents of which the Court may take judicial notice and therefore are admissible for the purpose of resolving the motions to dismiss. In addition, argue Defendants, because Plaintiffs do not contest the authenticity of the exhibits, Plaintiffs' objections about the ability of Markel and Rosen to authenticate the exhibits are meritless; there is no need to authenticate documents when there is no genuine controversy or reasonable doubt about their authenticity.

---

[7] The exhibits comprised of Bank of America and Salmon Smith Barney trading records and charts summarizing those trades (Rosen exhibits B-D and Markel exhibits A-D) are mentioned in the complaint at ¶¶ 150-151.

[8] The trading records exhibits provide an accurate representation of Plaintiffs' trading at Banc of America and Salomon Smith Barney.

[9] For example, Enron's press releases and earnings announcements, the prospectus for Enron's 7% Exchangeable Notes, public credit ratings for Enron debt securities purchased by Plaintiffs, investment research provided by securities brokerages including Banc of America and Salomon Smith Barney.

Federal Rule of Evidence 201(b) allows the Court to take judicial notice only of a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Furthermore, Rule 201(g) states, "In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed." In reviewing a Rule 12(b)(6) motion to dismiss a claim for securities fraud on the pleadings, the district court may take judicial notice of and consider the contents of relevant public disclosure documents that are required by law to be filed with the Securities Exchange Commission ("the SEC") and are actually filed with the SEC, with the restriction that these documents may be considered only for the purpose of determining what statements they contain and not for proving the truth of their contents. *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996), *citing and adopting rule of Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991). The Court may also take judicial notice of stock prices and documents of public record, such as the complaints in the securities actions. *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 167 n.8 (2d Cir. 2000)(well-publicized stock prices); *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991)(court documents); *Hausber v. CompUSA*, No. 3:94-CV-1151-H, 1995 U.S. Dist. LEXIS 20333, at *31 n.14 (N.D. Tex. Oct. 30, 1995); *Davis v. Bayless*, 70 F.3d 367, 372 n.3 (5th Cir.

1995)(reviewing documents of public record does not convert a Rule 12(b)(6) motion into a motion for summary judgment under Rule 56).

The Fifth Circuit recognizes the incorporation-by-reference doctrine. *Collin v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000)("'Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim.'"); *Lovelace*, 78 F.3d at 1018 (even if not attached, court can consider "documents . . . incorporated in the complaint); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1327 at 762-63 (2d ed. 1990)("when [a] plaintiff fails to introduce a pertinent document as part of his pleading, [a] defendant may introduce the exhibit as part of his motion attacking the pleading"). Thus in suits under the federal securities laws courts may also routinely consider in a Rule 12(b)(6) review not only documents named in Plaintiffs' complaint, but even documents that, if not named, are "pertinent," "central" or 'integral to [Plaintiffs'] claim." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *cert denied*, 512 U.S. 1219 (1994); *In re Landry's Seafood Restaurants, Inc. Sec. Litig.*, H-99-1948, slip op, at 3 n.8 (S.D. Tex. 2001); *Sturm v. Marriott Marquis Corp.*, 85 F. Supp.2d 1356, 1366 (N.D. Ga. 2000)("The district courts cannot fulfill their gatekeeping role if plaintiffs are free to quote selectively or out of context from documents that they rely upon, and avoid further examination of the documents by not attaching them to the complaint"). The Court may also consider documents

"integral to and explicitly relied on in the complaint," that the defendant appends to his motion to dismiss, as well as the full text of documents that are partially quoted or referred to in the complaint. *Phillips v. LCI Intern.*, Inc., 190 F.3d 609, 618 (4th Cir. 1999); *Harris v. IVAX Corp.*, 182 F.3d 799, 802 n.2 (11th Cir. 1999); *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 808-09 (2d Cir. 1996). Thus if the plaintiff fails to attach a public document upon which he relies to his complaint, the defendant is entitled to produce such a document in support of a motion to dismiss if the document is integral to the complaint. *San Leandro*, 75 F.3d at 809.

Under Fed. R. Evid. 1006, a summary chart may be included as evidence if the underlying documents are also submitted for consideration by the Court and thus the chart is not hearsay. Furthermore, under Fed. R. of Evid. 902(6), newspaper and periodical articles are self-authenticating.

Thus the Court concurs with Defendants and concludes that the motions to strike the Rosen and Markel affidavits (and exhibits) should be denied.

Defendants move to strike Morwick's declaration (and its many attached exhibits) or, alternatively, request the Court to not consider the declaration because it is an improper attempt to bolster the insufficient factual allegations of the complaint. *Branch v. Tower Air, Inc.*, No. 94 Civ. 6625, 1995 WL 649935, at *6 (S.D.N.Y. Nov. 3, 1995((" [M]emoranda and supporting affidavits in opposition to a motion to dismiss cannot be used to cure a

defective complaint, nor can reliance upon liberal pleading requirements of Fed. R. Civ. P. 8(a) cure the material defect of failing to plead fraud with particularity."). Alternatively, because the declaration is filled with unsupported hearsay and statements of which Morwick could not have personal knowledge, Defendants request the Court not to consider it in ruling on the pending motions to dismiss.

In opposition, Plaintiffs explain that they submitted Morwick's declaration to rebut Glitter's affidavit and its attached "extraneous material," which they claim Defendants used to make factually incorrect and baseless allegations against Plaintiffs. They also again argue that Glitter's affidavit with its exhibits may not be considered on a motion pursuant to Fed. R. Civ. P. 12(b)(6) because Defendants are limited to documents attached to the complaint and documents incorporated by reference in the complaint. *Hayden*, 180 F.3d at 54.

Since the Court has stricken Glitter's affidavit and exhibits, there is no need for Morwick's declaration, so the Court grants Defendants' motion to strike it.

Accordingly, for the reasons stated above, the Court ORDERS the following:

(1) Plaintiffs' motion to strike (instrument #27) the Declaration [Affidavit] of Max Glitter is GRANTED as it relates to Goldman, Sachs' motion to dismiss only;

(2) Defendants' motion to strike declaration of Louise Morwick (# 37) is GRANTED;

(3) Plaintiffs' motions to strike declarations of Rosen and Markel (#41 and 42) are DENIED.

SIGNED at Houston, Texas, this 26th day of March, 2004.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

TRUE COPY I CERTIFY
ATTEST:
MICHAEL N. MILBY, Clerk
By Deputy Clerk